IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

NICOLE ANNE COLBERT,	)	
	)	C.A. No. K10C-01-001 JTV
Plaintiff,	)	
	)	
v.	)	
	)	
GOODVILLE MUTUAL CASUALTY COMPANY, BLUE HEN CLAIMS SERVICE, INC., and JOHN F. MCGOUGH,	)	
	)	
Defendants.	)	

Submitted: March 26, 2010
Decided: June 30, 2010

Robert C. Collins, II, Esq., Schwartz & Schwartz, Dover, Delaware. Attorney for Plaintiff.

Scott L. Silar, Esq., Margolis Edelstein, Wilmington, Delaware. Attorney for Defendant Goodville.

Mary E. Sherlock, Esq., Weber, Gallagher, Simpson, Stapleton, Fires & Newby, Dover, Delaware. Attorney for Defendants Blue Hen Claims and McGough.

Upon Consideration of Defendants'
Blue Hen Claims & McGough's Motion to Dismiss
GRANTED as to Counts 1 through 6

VAUGHN, President Judge

ORDER

Upon consideration of the motion to dismiss filed by defendants Blue Hen Claims Service, Inc. and John F. McGough ("moving defendants"), the plaintiff's opposition thereto, and the record of this case, it appears that:

1. On February 24, 2007, the plaintiff, Nicole Anne Colbert, was walking in the Target parking lot in Dover, Delaware when she was struck by a car driven by Marc Ostroff. Mr. Ostroff's vehicle was insured by defendant Goodville Mutual Casualty Company. The plaintiff sought PIP benefits from Goodville. Goodville had Blue Hen Claims do the adjusting work on the plaintiff's claim. Defendant McGough is an employee of Blue Hen Claims.

2. The plaintiff's injures were to her neck, back, and right shoulder. She had those injuries treated by Dr. Lawrence Piccioni. Some time before May 24, 2007, Dr. Piccioni informed the plaintiff that she needed to return for treatment only on an as-needed basis. He did not opine that her reasonable and necessary medical treatments had ended. Nonetheless, on May 24, 2007, the defendants took the position that no further payments would be made for orthopedic treatment or physical therapy. In addition, on August 3, 2007, the defendant, specifically Blue Hen Claims through Mr. McGough, informed the plaintiff that medical bills for treatment by another doctor, Dr. Eric Schwartz, would not be paid.

3. The defendants then arranged for the plaintiff to be examined by Dr. Michael Mattern regarding her injuries and any need for future treatment. The plaintiff was examined by Dr. Mattern on September 14, 2007. He issued a report "essentially stating that it was his opinion [that the p]laintiff did not require physical

therapy."[1] Based upon that medical opinion, Blue Hen Claims, in an October 3, 2007 letter from Mr. McGough, informed the plaintiff that no further treatment of any kind would be covered by PIP. As a result of this denial of coverage, the plaintiff alleges that she has sustained unpaid medical expenses, lost wages, financial hardship, humiliation, unnecessary physical pain, and a delay in receiving the medical treatment she needed. All of the foregoing facts are taken from the complaint**.**

4. On January 4, 2010, the plaintiff filed this suit against Goodville, Blue Hen Claims, and Mr. McGough. Her complaint contains seven counts with the following titles: (1). Claim 1: Breach of Contract; (2). Claim 2: Bad Faith Breach of Contract; (3). Claim 3: Breach of the Implied Covenant of Good Faith and Fair Dealing; (4). *Prima Facie* Tort; (5). Violation of 21 *Del. C*. § 2118B; (6). Violation of 21 *Del. C*. § 2118(i)(2); and (7). Violation of 18 *Del. C*. § 2304(16). The nature of the claim in each count is fairly suggested by the count's name.

5. Plaintiff's counsel agrees that Count 7 does not state a viable claim against the moving defendants. In this Order, the Court addresses the plaintiff's claims against the moving defendants under Counts 1 through 6.

6. Blue Hen Claims and Mr. McGough have moved to dismiss the plaintiff's complaint for failure to state a claim upon which relief may be granted.[2]

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[1] Compl. ¶ 18.

[2] The moving defendants incorrectly titled their motion a "motion to dismiss pursuant to ... Rule 12(c)." This typographical error caused confusion among the other parties, who proceeded to discuss the standard of review under Rule 12(c) and Rule 56, and partly shaped their arguments with those standards in mind. Because the pleadings were not closed when the moving defendants filed their motion, the proper standard of review is the standard used under Rule 12(b)(6).

Their primary contention is that because they are a claims adjusting company and an individual adjuster employed by that company, and not an insurance company, the plaintiff has no legal basis to sue them. They contend that the plaintiff can have claims only against Goodville. The moving defendants contend that each type of claim – contract, tort, and statutory – must be dismissed. First, they contend that the plaintiff may not bring contract claims against them because they were not parties to any contract with the plaintiff. Second, they contend that the plaintiff's tort claim is really a bad faith contract claim which has been rephrased as tort and that the claim is barred by the applicable statute of limitations. Finally, they contend that the statutes they allegedly violated apply only to insurers.

7. The plaintiff contends that her contract claims are viable against the moving defendants because they were agents of Goodville. As to the tort claim, the plaintiff contends that it is an alternative pleading, and that the claim is not barred by the statute of limitations. Concerning her statutory claims, the plaintiff concedes that the statutes at issue refer only to insurers, but she contends that the Court should read the statutes broadly to include adjusters as well. Finally, the plaintiff argues that it would be inappropriate to dismiss her claims against the moving defendants at this point in the litigation because the underlying legal issue is a matter of first impression.

8. Goodville also responded to the moving defendants' motion. In general, Goodville contends that it would be best to allow discovery to proceed in order to

develop the factual record.[3] Goodville contends that the distinction the moving defendants have made between insurers and claims adjusters does not make a difference in this case. Goodville argues that "[t]he Court should allow the [p]laintiff to bring her action against [all] parties and allow the Court to decide the issue of whether an action may be brought against a Third-Party Administrator or Claims Company in the context of bad faith litigation."[4]

9. The standard of review under Rule 12(b)(6) is a familiar one. Upon a motion to dismiss for failure to state a claim upon which relief can be granted, a complaint is subjected to a broad test of sufficiency.[5] Dismissal is appropriate only if it is reasonably certain "that the plaintiff could not prove any set of facts that would entitle [her] to relief."[6] The complaint will not be dismissed unless it clearly lacks factual or legal merit.[7] When considering a motion to dismiss, the court will accept all well-pleaded allegations as true.[8] In addition, every reasonable factual inference

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[3] Also, Goodville echoes the plaintiff's belief that this case raises a matter of first impression.

[4] Goodville Resp. Mot. at ¶ 1. Goodville also argued that dismissal of the plaintiff's claims against the moving defendants is improper because Goodville has filed contribution and indemnification cross claims against the moving defendants. *Id.* at ¶ 6. I find this contention unpersuasive.

[5] *See C & J Paving, Inc. v. Hickory Commons, LLC*, 2006 WL 3898268, at *1 (Del. Super.).

[6] *Ramunno v. Crawley*, 705 A.2d 1029, 1034 (Del. 1998) (citing *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).

[7] *Diamond State Tel. Co. v. Univ. of Del.,* 269 A.2d 52, 58 (Del. 1970).

[8] *Spence*, 396 A.2d at 968.

will be drawn in favor of the plaintiff.[9] The complaint must, however, contain "sufficient facts to state a cognizable claim."[10]

10. I conclude that the claims against the moving defendants which are based on contract (Counts 1, 2 and 3) must be dismissed because (1) no contract exists between the plaintiff and the moving defendants; and (2) the plaintiff is not a third-party beneficiary of any contract to which the moving defendants are a party.

11. There are two contracts at issue in this case: one, the insurance contract between Goodville and Mr. Ostroff; and two, the contract for claims adjusting services between Goodville and Blue Hen Claims.

12. The plaintiff was a third-party beneficiary of the insurance contract by operation of law.[11] This is so because Delaware's no-fault statute requires that coverage "be applicable . . . to any other person injured in an accident involving such motor vehicle,"[12] including pedestrians.[13] Thus, the plaintiff has a well-established claim against Goodville for PIP benefits. However, no claim lies against the moving defendants under the insurance contract because the moving defendants are not

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[9] *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

[10] *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 285 (Del. Ch. 2003).

[11] *See Swain v. State Farm Mut. Ins. Co.*, 2003 WL 22853415, at *2 (Del. Super.) (holding that a passenger injured in an accident may bring a claim of bad faith against the insurer despite not being a party to the insurance contract because the passenger was an intended third-party beneficiary).

[12] 21 *Del. C.* § 2118(a)(2)(c).

[13] § 2118(a)(2)(e).

parties to that contract.

13. I also conclude that no claim lies against the moving defendants under the agreement between Goodville and Blue Hen Claims in which Blue Hen Claims agreed to provide adjusting services on Goodville's behalf. In my opinion, such an agreement cannot give rise to a third-party claim of the plaintiff against Blue Hen Claims or its employee, Mr. McGough. In order for a non-party to be a third-party beneficiary, the contracting parties must intend that the non-party receive a benefit sufficient to entitle that party to enforce the contract in the courts.[14] The fact that a non-party receives an incidental, indirect, or consequential benefit is not sufficient.[15] The benefit to the plaintiff which arises from a claims adjusting agreement is indirect and insufficient to give rise to third-party beneficiary status.[16] I also conclude that Mr. McGough cannot be sued personally, because he is merely an employee / agent of Blue Hen Claims.

14. I also conclude that the plaintiff has failed to plead a sufficient *prima facie* tort claim. While the complaint does recite the elements of a *prima facie* tort

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[14] *Delmar News, Inc., v. Jacobs Oil Co.,* 584 A.2d 531, 534 (Del. Super. 1990) (citing *Oliver B. Cannon & Sons, Inc., v. Dorr-Oliver, Inc.*, 312 A.2d 322 (Del. Super. 1973)).

[15] *Pettit v. Country Life Homes, Inc.,* 2009 WL 846922, at *2-3 (Del. Super. 2009) (quoting *Hostetter v. Hartford, Ins. Co.,* 1992 WL 179434, at *6 (Del. Super. 1992)).

[16] The plaintiff's breach of contract claims based on agency law are without merit. In the plaintiff's complaint, she alleges that Blue Hen Claims was the agent of Goodville. Compl. ¶ 5. "Delaware follows the principle that in a breach of contract action, where the principal is disclosed, only the principal is liable for a breach thereof, not the agent." *Harris v. Dependable Used Cars, Inc*., 1997 WL 358302, at *1 (Del. Super.) (quotation marks and alterations omitted).

claim,[17] the basis of the claim is nearly identical to the basis of the plaintiff's contract claims,[18] in particular her bad faith claim.[19] A *prima facie* tort claim "is not a duplicative remedy for claims that can be sounded in other traditionally recognized tort theories, or a catchall remedy of last resort for claims that are not otherwise salvageable under traditional causes of action."[20] Moreover, the first element of a *prima facie* tort claim - the intentional infliction of harm - "has been refined to require not only that it must be 'intentionally malicious,' but also that it must be 'solely malicious.'"[21] In other words, "the act must not have been the product of mixed motive but must have been motivated solely by the desire to do injury."[22] "[W]hen there are other motives, such as profit, self-interest, or business advantage, no

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[17] *Compare Nix v. Sawyer*, 466 A.2d 407, 412 (Del. Super. 1983) (listing the elements of a *prima facie* tort claim as "the intentional infliction of harm, absent excuse or justification, resulting in damage by an act or series of acts which would otherwise be lawful and which do not fall within the categories of traditional tort); *with* Compl. ¶¶ 42-45. Notably, the *Nix* court cited to a 1978 Court of Chancery case, *Kaye v. Pantone, Inc.*, 395 A.2d 369, 373 (Del. Ch.), which had borrowed the definition of *prima facie* tort from a New York case, *Drago v. Buonaguiro*, 402 N.Y.S.2d 250, 252 (N.Y. App. Div. 1978).

[18] *Compare* Compl. ¶ 42 (*prima facie* tort claim), *with* Compl. ¶¶ 23, 25, 36 (allegations supporting the plaintiff's contract claims).

[19] Compl. ¶¶ 31-33.

[20] 86 C.J.S. *Torts* § 8 (footnotes omitted).

[21] *Ota v. Health-Chem Corp.*, 1986 WL 15559, at *8 (Del. Super) (applying New York law).

[22] *Id.*

recovery may be allowed under the doctrine of prima facie tort."[23] It is clear from the allegations in the plaintiff's complaint that the defendants had a non-malicious business motive for denying her claims - to minimize Goodville's claims payment. Accordingly, the plaintiff's *prima facie* tort claim must be dismissed.

15. Lastly, I consider the plaintiff's statutory claims, Counts 5 and 6 of the complaint. Count 5 alleges that all of the defendants violated their obligation under 21 *Del. C.* § 2118B(c) either to make payment or provide a written explanation of a denial within thirty days of the plaintiff's written request for PIP benefits.. Count 6 alleges that all of the defendants violated their obligation under 21 *Del. C.* § 2118(a)(2)(i)(2) to pay for the plaintiff's medical expenses "as soon as practical" because they have failed to pay for the plaintiff's MRI and arthroscopic surgery.

16. Both statutory sections that the defendants allegedly violated require compliance by "insurers," but neither section mentions claims adjusters or any other entities or individuals. While the term "insurer" is not defined in 21 *Del. C.* §§ 2118 or 2118B, 21 *Del. C.* § 2118(c) is instructive. That subsection states that only certain types of insurance policies can satisfy the requirements of § 2118: "policies validly issued by companies authorized to write [insurance policies] in this State."[24] This provision helps define the nature of the entity which qualifies as an "insurer" under §§ 2118 and 2118B; companies that are authorized to issue insurance policies in the State of Delaware. According to the plaintiff's complaint, only Goodville is such a

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[23] 86 C.J.S. *Torts* § 8; *see Ota*, 1986 WL 15559, at *8 ("Acts done for a legitimate business purpose do not constitute prima facie tort").

[24] 21 *Del. C.* §2118(c).

company.[25] Because the moving defendants do not qualify as insurers under either statute, they cannot be found to have violated those statutes. The plaintiff's statutory claims against the moving defendants must therefore be dismissed.

17. In summary, the moving defendants' motion to dismiss is ***granted as to Counts 1 through 6***. Still before me is the plaintiff's motion to amend the complaint to add a new count. The Court will address that motion in a separate order at a later date.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File

[25] Compl. ¶ 2.